

## **STATE'S RESPONSE TO DEFENDANT'S MOTION TO SEVER**

A defendant's motion to sever must state as grounds for severance that he will be prejudiced by joinder and must state facts to support his argument. The defendant will not be prejudiced by "guilt by association" evidence of codefendants' other acts when he is not charged with those acts and no evidence will be presented linking him to those other acts, and when the jury is admonished not to consider one codefendant's acts against another.

The State of Arizona, by and through undersigned counsel, respectfully requests this Court to deny the Defendant's Motion to Sever, for the reasons set forth in the following Memorandum of Points and Authorities.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

#### **I. FACTS**

The defense's motion to sever refers to defendant Brandon Draper being linked to a kidnapping scheme and money laundering, as well as a cocaine and heroin distribution scheme, all of which were part of the Sanchez-Lopez Drug Organization. None of these acts were charged by the State and the defendant's reference to them is meritless.

On April 12, 1999, police initiated a wiretap investigation into the Sanchez-Lopez Drug Organization. During that time, police monitored up to six telephone lines at once. On April 23, 1999, while monitoring Roberto Lopez's (codefendant A) telephone, police learned that Marco Moreno (codefendant D) was bringing a "brother" from San Diego to a stash house located at 4431 North 48th Lane in order to purchase up to 500 pounds of marijuana. The "brother" was later learned to be defendant Brandon Draper. Police conducted surveillance at that location and observed Marco Moreno, the defendant, and an unidentified white male arrive in a red van. The three men later left the house

carrying two cardboard boxes and placed them into the van. Police followed the red van to the Marriott Residence Inn, located at 5075 South Priest Drive in Tempe.

When Sergeant Cope arrived at the Residence Inn to assist Detective Gomez on foot surveillance, Detective Gomez informed the sergeant that he had observed a white male with long dreadlock-type hair. This dreadlock-haired man carried a large black duffel bag from the maroon van into a corridor at the south end of building # 10 that contained four rooms. Detective Gomez was unsure which room the man had entered. Both officers went to the night manager's office and were informed that three of the four rooms had been rented by corporations and the fourth room, room #1012, was rented by Robin Lee Chrestman (co-defendant J). Finding room #1012, Sergeant Cope observed Robin Lee Chrestman walk out of that room. Chrestman went to her 1997 white Dodge pickup truck, retrieved a boot-size white box out of the back camper shell, and carried it back to room #1012.

Five minutes later, Brandon Draper (co-defendant I) walked out of room #1012 with a black duffel bag and the same white boot box under his arm. Sergeant Cope then followed Draper to room #1614. Draper walked into that room. Sergeant Cope looked through the window of room #1614 and saw Marco Moreno and Brandon Draper inside. The white boot box was now sitting on a table in front of Marco Moreno. As Sergeant Cope began walking away from the window of room #1614, Brandon Draper started to walk out of the room and stood in the doorway with the black duffel bag. Sergeant Cope then heard Marco Moreno saying, "Do I have to count it?" Moreno then threw Brandon Draper a set of keys and told him, "Just put it in the van." The sergeant then saw Marco Moreno leave room #1614 and drive away in the maroon van.

Later that same evening, Detective Nejo and Detective Choulet conducted a “knock and talk” at room #1012. After receiving permission to search the room, the officers located and seized approximately 125 pounds of marijuana and the black duffel bag. An additional 300-400 pounds of marijuana was found in the camper shell of Robin Lee Chrestman's truck.

## **II. LEGAL ARGUMENT**

### **A. Because the defendant failed to properly articulate a claim pursuant to Rule 35.1, the court should strike the defendant's motion.**

Pursuant to Arizona Rules of Criminal Procedure Rule 35.1, a motion shall be accompanied by a memorandum stating the “specific factual grounds therefor and indicating the precise legal points, statutes and authorities relied upon . . . .” Ariz. R. Crim. P., Rule 35.1. The Arizona Supreme Court has held that a defendant must make the requisite showing of prejudice to substantiate severance. *State v. Van Winkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996); *State v. Murray*, 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995), *cert. denied*, 518 U.S. 1010, 116 S.Ct. 2535, 135 L.Ed.2d 1057 (1996), citing *State v. Atwood*, 171 Ariz. 576, 612, 832 P.2d 593, 629 (1992).

The defendant here has set forth no basis or facts to demonstrate that he will be prejudiced if his case is not severed for trial. He merely concludes that a joint trial will prejudice him “beyond rescue” and quotes one line from Rule 13.4 (a), Ariz. R. Crim. P., saying that severance is “necessary to promote a fair determination of guilt or innocence.” However, the defense motion does not set forth any specific factual grounds demonstrating any prejudice “beyond rescue,” nor does the motion provide any grounds to believe that a separate trial is necessary for a “fair determination of guilt or

innocence.” The State believes that the defense motion is simply relying upon the fact that this case involves a multi-count, multi-defendant indictment. This defendant will not be linked to any kidnapping, money laundering, or heroin or cocaine distribution schemes (although he will be linked to a major marijuana distribution scheme). Because he has not met the requirements of Rule 35.1 or Rule 13.4(a), Ariz. R. Crim. P., the State asks this Court to strike the defendant’s motion.

**B. If the court deems that defendant has properly articulated a basis for his claim, the State submits that severance is not required for a fair trial in this case.**

Case law is clear. Absent a clear abuse of discretion, a trial court’s decision to grant or deny a motion to sever will not be reversed. *State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995). Furthermore, despite the possibility of confusion in a joint trial, “In the interest of judicial economy, joint trials are the rule rather than the exception.” *State v. Van Winkle*, 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996), *citing State v. Murray*, *supra* at 25, 906 P.2d at 558.

If this Court rejects the State’s first argument, the State must rely on the defendant’s vague reference to Rule 13.4 and simply characterize defendant’s argument as a question of whether the defendant can receive a fair trial if a jury hears evidence properly admitted against other co-defendants.

**1. The defendant has not proven any compelling danger of prejudice in conducting a joint trial where defendant merely asserts guilt by association.**

The mere introduction of one co-defendant’s acts that do not involve the other co-defendant does not constitute sufficient grounds for severance. *Van Winkle*, *supra* at 339, 922 P.2d at 304, *citing State v. Poehnelt*, 150 Ariz. 136, 142, 722 P.2d 304, 310

(App. 1985). In *Van Winkle*, the Arizona Supreme Court found no error in the trial court's denial of severance where the defendant presented limited argument in support of the motion and could only assert that testimony regarding the co-defendant's criminal acts would influence the jury to convict Van Winkle by association. *Id.*

This case involves drug distribution. By the very nature of a large distribution organization, one would expect that many participating drug dealers would enter and leave the picture at different periods of time. The defendant is one of those drug dealers and a mere claim of guilt by association is not sufficient to warrant severance.

**2. Severance is not required where the jury can keep separate the evidence that is relevant to each defendant.**

A risk of “rub-off” or “spillover” occurs when “the jury’s unfavorable impression of the defendant against whom the evidence is properly admitted influence[s] the way jurors view the other defendant.” *Van Winkle, supra* at 339, 922 P.2d at 304, quoting *State v. Lawson*, 144 Ariz. 547, 555, 698 P.2d 1266, 1274 (1985). Severance is rarely granted when the defendant only alleges that the jury’s unfavorable impression of the other co-defendant will influence how the jurors perceive the defendant. *State v. Grannis*, 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995). The test for severance based on rub-off is whether the jury can “keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict” as to each. *Van Winkle, id.* at 339, 922 P.2d at 304, quoting *State v. Lawson*, 144 Ariz. 547, 555, 698 P.2d 1266, 1274 (1985). This rub-off effect warrants severance only when the defendant proves a compelling danger of prejudice against which the trial court just cannot protect. *Id.* Admonishing the jury to keep the evidence separate as it applies to each defendant is sufficient to the risk of

prejudice in a joint trial. *Van Winkle, id.* at 341, 922 P.2d at 306, *citing State v. Runningeagle*, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993).

In this case, the facts indicate several drug deals and the evidence applying to each defendant is clear. The State submits that the jury will have no problem in distinguishing the evidence particular to each defendant and rendering a fair and impartial verdict as to each defendant.

A defendant must make a requisite showing of prejudice to substantiate severance. *Van Winkle, id.* at 339, 922 P.2d at 304; *Murray, supra* at 25, 906 P.2d at 558. The mere introduction of one co-defendant's acts that do not involve the other co-defendant do not constitute sufficient grounds for severance. *Van Winkle, id.* Furthermore, no risk of "rub-off" or "spillover" occurs where the jury can keep separate the evidence that is relevant to each defendant. *Id.* Guilt by association is insufficient to establish a compelling danger of prejudice. *Id.*

The only basis for severance that the defense motion alleges is that introduction of testimony regarding kidnapping, money laundering, and cocaine and heroin distribution will prejudice the defendant "beyond rescue." But the State has never charged any of those acts. The State did charge criminal acts resulting from the distribution of marijuana and the State charged the defendant pursuant to that scheme.

### **III. CONCLUSION**

The State submits that the defendant has failed to properly state a claim and has failed to show any compelling danger of prejudice. For the foregoing reasons, the State respectfully requests that this Court deny the defendant's Motion to Sever.